UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

PPG AEROSPACE INDUSTRIES, INC.

and

Case Nos. 10-CA-36530
10-RC-15611

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW)

# ANSWERING BRIEF OF THE UNION

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## I. STATEMENT OF THE CASE AND PROCEDURAL BACKGROUND

This consolidated complaint and representation case now comes before the National Labor Relations Board pursuant to a October 19, 2007 Decision and Order by the Honorable Lawrence W. Cullen, Administrative Law Judge, who conducted a hearing in these cases at the federal courthouse in Huntsville, Alabama, from April 30, 2007 through May 2, 2007.

The Complaint in case 10-CA-36350 alleged that beginning on September 1, 2006, the Respondent engaged in six (6) violations of Section 8(a)(1) of the Act: (1) engaging in closer scrutiny and monitoring of employees' movements and conversations because of employees' Union activities (Complaint ¶ 7); (2) threatening loss of benefits because of Union activities (Complaint ¶ 8); (3) threatening inevitability of strike if employees unionized (Complaint ¶ 9(a)); (4) threatening to replace employees in the event of a strike (Complaint ¶ 9(b)); (5) threatening that selecting the Union would be futile (Complaint ¶ 9(c)); and (6) creating an impression that it was engaged in surveillance of Union activities (Complaint ¶ 10). Objections to the election coextensive with the unfair labor practices were filed by the Union and the Regional Director concluded that Objections 1, 3, 5, 8 and 10 could best be resolved by a hearing.

At hearing, the parties adduced evidence relevant both to the unfair labor practices alleged by the Complaint, and to matters raised by the representation proceeding. Judge Cullen assessed the demeanor and testimony of the witnesses and made the requisite credibility determinations, several of which were not favorable for the respondent's witnesses. It is these credibility determinations which are in essence, the whole of the respondent's attack on the Judge's decision and order.

On or about August 2006, the United Automobile, Aerospace & Agricultural Implement

Workers of America, AFL-CIO ("Union") began an organizing drive among the Respondent's rank-and-file employees, including all production and maintenance employees at its facility in Huntsville, Alabama. (GC1(j);TR 14, lines 14-18). The Respondent manufactures aircraft transparencies. (GC1(e), page 2). On August 30, 2006, the Union filed its petition for election in case 10-RC-15611 seeking to represent the production and maintenance employees at Respondent's Huntsville facility. An election was held on October 18, 2006. The Tally of Ballots was issued by the Region on October 18, 2006 showing that the Union had lost the election 214-210. On October 25, 2006, the Union filed Objections to Conduct Affecting the Results of the Election and subsequently filed coextensive unfair labor practice charges against the Respondent. On January 23, 2007, the Regional Director issued the Order Directing Hearing, Order Consolidating Cases, Order Transferring Cases to the Board and Notice of Hearing. On February 5, 2007, the Respondent filed its Answer to Complaint And Report of Challenged Ballots and Objections. (GC1).

## II. FACTUAL BACKGROUND

### A. Supervisory Monitoring and Scrutiny of Employee Movements and Employee Conversations Because of their Support for the Union.

The day after the Union filed its election petition, on or about September 1, 2006, and continuing through the election, the Respondent, acting through its supervisors and agents, Sue Cooper, Greg Campbell, and Paul Rigsby began to closely scrutinize and monitor the movements and conversations of its production and maintenance employees because of their support for the Union. (GC 1(e)). Employees Gary Dwayne Sims, and Iva Jane Mayes testified at the hearing in this case as to the facts that supported these allegations.

Ms. Mayes, who has worked at Respondent's facility for twelve (12) years, worked in the finishing department between August 2006 and October 2006. Her basic responsibilities included sealing and painting the windows in preparation for their final inspection and shipping. (TR 9). The Respondent operated three shifts in the finishing department (6:30 a.m.-2:30 p.m., 2:30 p.m. –10:30 p.m., and 10:30 p.m.-6:30 a.m.). Ms. Mayes worked the first and second shifts, under the supervision of Supervisor Cooper. (TR 10). There were about thirty-three (33) employees who worked on a given shift. From her workstation, Ms. Mayes was able to observe the movements and conversations of her co-workers in the finishing department. (TR 11 line 19).

On or about September 1, 2006, Ms. Mayes observed a conversation at the workstation of her co-worker Jeff Lindsey. (TR 16 lines 23-25, TR17). The Respondent did not normally permit employees to carry on extended conversations at their workstations, which are commonly referred to by the employees as "cells." (TR 23 lines 1-12). Ms. Mayes knew that Mr. Lindsey was not a supporter of the Union. (TR 15 lines 16-19). She observed Mr. Lindsey and Mr. Rodney Brownsfield (TR 16; 17) having a conversation in Mr. Brownsfield's cell, which was located about fifteen (15) to twenty (20) feet from Mr. Lindsey's cell. (TR 16 lines 18-22). Ms. Mayes knew that Mr. Brownsfield supported the Union because she had attended Union meetings that he also attended and and she had observed him wearing pro-union buttons and listened while he discussed union-related issues. (TR 16 lines 4-9). Mr. Brownsfield and Mr. Lindsey were not working at the time of the conversation, because Mr. Brownsfield worked in Boeing cell 291/294 and Mr. Lindsey's cell was located about fifteen (15) to twenty (20) feet from Mr. Brownfield's cell. The two employees were not on break at that time. Ms. Mayes knew they were not on break because they all had the same break time and Ms. Mayes was not on

break. (TR 18 lines 2-3; 9-14). Ms. Mayes walked over to where the two men were engaged in conversation. Supervisor Cooper immediately approached her and told Ms. Mayes to return to her cell. Supervisor Cooper personally escorted Ms. Mayes back to her cell. "(Supervisor Cooper) told me that she couldn't have two union people gang up on a non-union person." (TR 17 lines 10-12). This was the first time that Ms. Mayes recalled that Supervisor Cooper had personally escorted her back to her workstation. (TR 17 lines 17-19).

During this time period, Ms. Mayes observed Mr. Lindsey engaged in other uninterrupted conversations at the facility in the presence of Supervisor Cooper, and these uninterrupted conversations were regular occurrences. (TR 20 lines 1-2). Although Supervisor Cooper denied observing these conversations (TR 319 lines 508), Ms. Mayes observed that these conversations lasted up to thirty (30) minutes. Those present would be both union supporters and anti-union supporters. (TR 20 lines 1-11). When there were conversations led by employees who supported the union like Jay Balcerek, Ms. Mayes observed that the Respondent's supervisors would immediately interrupt these conversations. For example on or about September 27, 2006, Ms. Mayes and Mr. Balcerek were having a conversation near his workstation and Supervisor Cooper "came out of her office and told us we needed to go back to work." As instructed by Supervisor Cooper, Ms. Mayes returned to her cell. (TR 20 lines 16-25; 21 lines 1-8). In addition to Ms. Mayes, Mr. Sims observed during this same time period that Respondent's supervisors and managers on his shift closely watched the movements and conversations of employees in the assembly department because they supported the Union.

Mr. Sims worked as an assembler in the assembly room from August 2006 through October 2006, working the first and second shifts. The assembly room is a self-contained room and each

work station is cornered off with plastic, transparent curtains similar to shower curtains. (TR 101). Some of his work projects could be completed in thirty (30) minutes and some projects would require a day and a half to complete. Mr. Sims and his co-workers would help one another, and would engage in general conversation because "you had a little down time" between parts and assignments.

Mr. Sims was an outspoken Union supporter and wore union buttons during his shifts at work. He also attended union meetings (TR 102), including a union meeting in September 2006. (TR 102). At this particular meeting, Union Organizer Harvey Durham asked Mr. Sims and ten (10) to twelve (12) of his co-workers to pose for a picture. They agreed and posed with signs that read "Union Yes." They posed with their clenched fists in the air. (TR 104). These employees were told the picture would be posted on the Union's Internet website. Once Mr. Sims returned to work, some of his co-workers approached him and told him that they had seen the picture of Mr. Sims and co-workers on the Union's website. During this time period, he walked into Supervisor Campbell's office to retrieve a product or to order some supplies. Mr. Sims, Supervisor Campbell and Supervisor Rigsby were present. Supervisor Campbell, turning around in his chair, smiled at Mr. Sims and held his fist in the air like Mr. Sims and his co-workers had held their fists in the air on the photograph that had been posted on the Union's website. (TR 105). Supervisor Campbell, still holding his clenched fist in the air, asked Mr. Sims "what is this?" Mr. Sims claimed he didn't know what he meant, stating "I don't know what you are talking about." Supervisor Campbell lowered his hand and then he clenched his fist again and held it in the air and once again asked Mr. Sims "what is this?" Mr. Sims repeated his earlier response. Finally, Supervisor Campbell turned to Supervisor Rigsby, still with his clenched fist in the air and said "Paul, have you ever seen this

before?" (referencing his clenched fist in the air) and Supervisor Rigsby answered "yeah, I think I have." (TR 106 lines 1-10). Supervisor Campbell and Supervisor Rigsby denied that the conversation with Mr. Sims occurred. (TR 338 lines 19-21; TR349 lines 7-10). Following this particular episode in Supervisor Campbell's office, Mr. Sims noticed a change in Supervisor Campbell's attitude and demeanor toward him.

Mr. Sims observed Supervisor Campbell's behavior from September 2006 through October 2006 at the facility. Mr. Sims observed Supervisor Campbell, who denied his attitude toward Mr. Sims changed (TR 34 lines 10-12), walking up and down the aisles, looking around. When Mr. Sims would leave his workstation to help a co-worker or simply discuss an issue, Supervisor Campbell would stare at him from a distance with his arms folded. Even when Mr. Sims was working at his workstation, Supervisor Campbell would fold his arms and stare at him. (TR 106 lines 20-25). "He would not say nothing. He would just stare at me and when I got through helping them...he would just walk on." Prior to the Union's organizing drive in August 2006, if Supervisor Campbell had seen Mr. Sims talking with a co-worker, he would walk into the booth and say "guys what's going on," but he never simply stopped, folded his arms, and stared at Mr. Sims while he was helping his co-workers with a particular project. (TR 107).

During this same time period, Mr. Sims observed that his co-workers Mike Martin and Mary Mathis did not support the Union because they wore Vote No buttons at the facility and told Mr. Sims that they did not support the union. (TR 108 lines 1-19). Prior to the Union campaign, Mr. Sims observed Mr. Martin and Ms. Mathis at work and observed that they spoke only amongst themselves, and did not communicate with Mr. Sims or their other co-workers. (TR 108 lines 21-25). After the Union launched its campaign in August 2006, Mr. Sims observed a difference in the

attitudes of Mr. Martin and Ms. Mathis toward their co-workers at the facility. Both Mr. Martin and Ms. Mathis started talking to their co-workers. "They were talking to everybody,...(in) all the booths and talking to everybody. Just really outgoing." (TR 109 lines 1-7). Mr. Sims observed that when Mr. Martin and Ms. Mathis spoke to their co-workers in the presence of their supervisors the supervisors did not interrupt their conversations or direct Mr. Martin or Ms. Mathis to return to their workstations. (TR 109 lines 16-25).

### B. Employee Mayes Threatened With Loss of Benefits Because of Her Support for the Union

Following the episode when Supervisor Cooper escorted Ms. Mayes back to her workstation, Supervisor Cooper engaged Ms. Mayes in a conversation about her benefits. Supervisor Cooper told Ms. Mayes that she was afraid of the "unknown and she would rather go with the known." Then, she asked Ms. Mayes if she had ever missed a paycheck and Ms. Mayes agreed that she had not missed a paycheck because she had received a benefit called Salary Continuance (hereinafter "SC"). (TR 18 lines 20-25). Salary Continuance is a benefit that Respondent provides to those employees, who are off work more than six days due to illness in which they receive their full pay. Ms. Mayes was familiar with the SC benefit because she had received SC in 1996, 1997, and 2003 (while she was supervised by Supervisor Cooper). Ms. Mayes was receiving SC as of the date of the hearing. (TR 18; TR19). When Ms. Mayes asked Supervisor Cooper how her pay and the SC benefit were relevant to their conversation, Supervisor Cooper told her that "we would probably lose that with all this union stuff." (TR 18 lines 23-25; TR19 lines 1-6). Then, Supervisor Cooper said "that we would not be able to have a conversation...we would not be able to work through our problems." (TR 38 23-24). After Ms. Mayes reminded Supervisor Cooper that she had benefited from SC in

the past, Supervisor Cooper repeated to Ms. Mayes that she would probably lose it because of the union. (TR 19 lines 21-25). Supervisor Cooper denied that she made the statements that Ms. Mayes attributed to her (TR 317).

### C. Employees are Threatened with the Inevitability of a Strike, with Permanent Replacement and that Respondent Will Never Sign a Contract with the Union if the Employees Vote in Favor of the Union.

Sandra Lingo Hansen has worked as an assembler in Respondent's assembly room for the past two (2) years, inspecting and installing a windshield's internal components. Her work booth is a 10-by-10 metal frame with a plastic see-through curtain (TR 124 lines 9-25), through which she can see into the work booths of her co-workers in the assembly department. Since she started working as an assembler, she has worked rotating shifts each week, working days for a week (4 a.m.-2 p.m.) and then rotating to the night shift, 2 p.m.-10 p.m. Her supervisor since March or April 2006 has been Supervisor Campbell. Prior to October 16, 2006, when Supervisor Campbell worked, he was the only supervisor on the shift. (TR 127;128 lines 1-2,6-20).

On or about the last week of September 2006, Supervisor Campbell approached Mrs. Hansen while she was working at her workstation. Only Mrs. Hansen and Supervisor Campbell were present during the hour-long conversation. Ms. Hansen recalled clearly the conversation because it occurred one hour before her break. (TR 129). Approaching Mrs. Hansen with anti-union literature in his hand, Supervisor Campbell asked her if she had any questions. She told him that she was in support of the union and he said that he had spoken with some of her co-workers and that they had informed him that if the union called a strike that "every one of them said if there ever was a strike that they would cross the picket line." She said that whether or not the employees decided to strike was

subject to a vote by the members of the union. He said "you'll have to strike because that's the only power the union has" and that the state of Alabama was a right-to-work state and that the employees could be "replaced" if they decided to strike. He continued stating that the employees would not get a contract because the Respondent would not give the union a contract; therefore, the employees would be forced to strike. Mrs. Hansen continued to raise several issues and he continued stating, "I'm telling you if you vote yes, you better be prepared to strike because you will not get a contract. The company will not give you a contract." Mrs. Hansen continued to raise issues about her job security and stated that she believed the Union would get a contract because the Respondent would not want to lose all its skilled labor. He repeated "you will not get a contract. You will be forced to strike and fifty (50) other people have told me that they would cross the picket line." (TR130;TR139 lines 11-14,19-21). Then he handed Mrs. Hansen a flyer which contained "derogatory things about the union." Mrs. Hansen inquired as to whether or not he was concerned about his job security since the Respondent had hired a number of contract workers, but Supervisor Campbell would not budge from his previous statements. Ms. Mayes testified, "He just kept on saying you will not get a contract. Be prepared to strike." (TR 131). Supervisor Campbell denied that he made the threats attributed to him by Mrs. Hansen. (TR 334 lines 17-25). The day before the election, Mrs. Hansen approached Supervisor Campbell and informed him that she was serving as the Union's observer during the election and during this conversation Supervisor Campbell said "I hope you all lose." (TR 123 lines 1-12).

### D. The Lead Persons Have the Authority to and Make, Prioritize and Change Work Assignments

The lead persons in this case clearly have the ability to, and do in fact, make changes to work assignments and prioritize those work assignments in order to assure that production needs are met.

(Tr. 275-277, 279; CPX 2). The second shift lead persons assist the second shift supervisor in the "direct supervision of second shift employees. (CPX 3; Tr. 277-278). The lead persons who testified agreed that the company's written job descriptions accurately reflected what they do including prioritizing and changing work assignments when necessary. (Tr. 360, 362). The Respondent conceded at the hearing that lead employees assign work to groups of employees and may from time to time change work assignments with approval of their supervisor. The lead persons, however, have he authority to change work assignments to meet the Respondent's production needs.

## III. ARGUMENT

### A. The Administrative Law Judge's Credibility Determinations Should be Upheld

Having nothing to file exceptions to in terms of the undisputed facts that show that it committed unfair labor practices and objectionable election conduct, the Respondent, in the main bases the whole of its exceptions on Judge Cullen's credibility determinations and/or his weighing of the evidence. Indeed, a review of the Respondent's 46 exceptions shows that most of exceptions filed by the Respondent relate to Judge Cullen's crediting the testimony of the General Counsel's witnesses over the Respondent's witnesses or his determination of the weight to give the various pieces of evidence produced by the parties.

As basic as any other Board principle is that an administrative law judge's credibility findings are entitled to great deference, and the Board should not overrule such findings unless the clear preponderance of all the relevant evidence demonstrates that they are incorrect. Standard Drywall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d. Cir. 1951). Indeed, the Supreme Court has firmly established the deference owed to an administrative law judge's findings, particularly with

respect to credibility. In Universal Camera Corp. v. NLRB, 340 U.S. 474, 496 (1951), the Court stated:

> The "substantial evidence" standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witness and lived with the case has drawn conclusions different from the Board's than when he had reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case.

Thus, the Board should decline the Respondent's debilitating invitation to overrule the Administrative Law Judge in this case because the Judge, after listening to the witnesses and weighing their credibility, believed the General Counsel's witnesses over the Respondent's witnesses.

### B. The Record Clearly Established that the Respondent Violated Section 8(a)(1) Act by More Closely Scrutinizing and Monitoring the Movements and Conversations of its Employees who Were Union Supporters

The Administrative Law Judge correctly determined that Respondent violated §8(a)(1) of the Act on or about September 1, 2006, and continuing thereafter by closely scrutinizing and monitoring the movements and conversations of its employees. It is well-settled that where an employer's reason for restricting employees to their work areas is motivated by their union sympathies the restriction violates § 8(a)(1) of the Act. See, Fieldcrest Cannon, 318 N.L.R.B. 470, 507 (1995); Sealco Corp., 280 N.L.R.B. 151 (1986); Emergency One, Inc., 306 N.L.R.B. 800, 806 (1992); Standard Products, 281 N.L.R.B. 141, 154 (1986). The weight of the evidence establishes that the Respondent violated §8(a)(1). This determination is supported by the testimony of Mr. Sims and

Ms. Mayes, both of whom testified honestly and truthfully. Mr. Sims and Ms. Mayes were still employed with Respondent as of the date of the hearing. In Flexisteel Industries, 316 N.L.R.B. 745 (1995), the Board explained that when a current employee testifies against his employer, he does so contrary to his pecuniary interest, and accordingly the testimony is likely to be true. In Flexisteel, the Board discussed the historical practice of its Trial Examiners and Administrative Law Judges in considering the testimony of current employees against their employers and expressly approved the proposition that testimony by a current employee contrary to his employer is especially reliable. The Board declined to adopt a specific standard or test for determining if a current employee's testimony could be discredited, such as per se credible or presumptively credible; the framework leaves the ultimate credibility resolution to the trier of fact. Credibility conclusions always involve numerous factors but the proposition is well settled that where a non-alleged discriminatee current employee testifies against his or her employer, that testimony is likely true. Id. Thus, the fact that Judge Cullen credited Mayes and Sims over their respective supervisors is well grounded not only in fact, but Board predecent.

In Fieldcrest, supra, a supervisor walked into the employee smoking area where rank-and-file employees had congregated to smoke. The supervisor had rarely visited the smoking area before the Union had launched its organizational campaign. After the Union launched its campaign, the supervisor started visiting the employee smoking area every break. Id. at 502. One issue in Fieldcrest was the supervisor's more frequent trips to the employee smoking area after the union campaign was launched created the impression of placing the union activities of the employees under surveillance. The Board determined §8(a)(1) of the Act was violated because of the supervisor's increased patrol of the smoking room after the union had launched its union campaign. The

supervisor's increased patrol of the employee smoking area was probative evidence that Respondent was closely scrutinizing the conversations of its employees, and monitoring the activities of its employees because they supported the Union. Id. at 504.

It is clear that on or about September 1, 2006, and continuing thereafter, Supervisor Cooper, Supervisor Campbell, and Supervisor Rigsby more closely scrutinized and monitored the movements and conversations of its employees because they supported the Union. First, on or about September 2006, Supervisor Campbell asked Mr. Sims "What's this?" (TR106 Lines 1-10). Supervisor Campbell was referencing his own clenched fist that he was holding in the air. It was more than mere coincidence that Mr. Sims and his coworkers had similarly held their fists in the air while posing for the photograph at the union meeting. Supervisor Campbell then turned to Supervisor Rigsby, still with his clenched first in the air, and asked Supervisor Rigsby had he "ever seen this before?" Supervisor Rigsby answered in the affirmative. (TR 106). This evidence establishes that Supervisor Campbell and Supervisor Rigsby wanted Mr. Sims to know that his supervisors were scrutinizing and monitoring his union activities and the union activities of his fellow workers. And indeed they were. While denying that such an incident took place, Campbell was not credited by the Judge. Moreover, other than its general denial, the Respondent had no explanation why its supervisors would engage in such conduct. Clearly because it is an admission that the Respondent's supervisors were closely monitoring and scrutinizing the employees' Union activities. Furthermore, although the two supervisors denied that this conversation occurred, Mr. Sims is a more credible witness because he was still employed at Respondent's facility when he testified. Flexisteel Industries, 316 N.L.R.B. 745 (1995). It is well-settled by the Board that monitoring and scrutinizing the movements of employees because they support the union violates Section 8(a)(1). Fieldcrest Cannon at 504.

In Standard Products, 281 N.L.R.B. 141, 154 (1986), prior to an election, the employer's supervisors restricted the movements of rank-and-file employees throughout the plant to their work areas, except during breaks. The employer's defense was that it had restricted employee movement, prior to the union campaign. The employer alleged that the restriction was necessary, because employees who left their work areas had interrupted other departments, interrupted their co-workers, and negatively impacted production. The Board found it more than mere coincidence that the employer would place a tighter reign on its employees by restricting their movements more so after the initiation of the Union's campaign. The Board determined the employer violated Section 8(a)(1) of the Act by restricting employee movement within its facility in order to demonstrate to its employees how unpleasant "life could be if employees continued their support of the Union and to limit the opportunities employees might have to muster support for the Union." Id. at 154.

Respondent's supervisors scrutinized and monitored the movements of its rank-and-file employees like Mr. Sims and Ms. Mayes, because the supervisors wanted to demonstrate to Respondent's employees how unpleasant they could make life at Respondent's Huntsville facility for those employees who continued to support the Union. Furthermore, Respondent sought to limit and restrict the movements and conversations of those employees who supported the Union. Respondent wanted to restrict the movements of Mr. Sims, Ms. Mayes, or other employees who were mustering further union support from their co-workers, who had not decided whether or not to support the Union. Despite the Respondent's belief to the contrary, the right to organize their fellow workers is protected by § 7 of the Act. Id. at 154. While the movements and conversations of its employees who supported the Union were restricted, Respondent did not restrict the movements or conversations of its employees who did not support the Union.

For instance, on or about September 1, 2006, Ms. Mayes observed Mr. Lindsey, who did not support the union, engaged in a conversation with Mr. Brownsfield, standing in Mr. Brownsfield's cell. The two men were not on break because they had the same break period as Ms. Mayes, who was not on break when she had observed the two men. She had observed that Mr. Brownsfield had worn a button at the facility that demonstrated his support of the Union. When Ms. Mayes approached the two men, Supervisor Cooper immediately approached her and instructed her to return to her cell, telling Ms. Mayes, "I can't have two union people ganging up on a non-union person." (TR 17 lines 10-12). This evidence establishes that Supervisor Cooper scrutinized the movements of employees who supported the Union like Ms. Mayes and Mr. Brownsfield. Supervisor Cooper alleged that she monitored all employee movement, irrespective of their Union affiliation. The ALJ found that Ms. Mayes was the more credible witness. Because she was still employed at Respondent's Huntsville facility as of the date of her testimony this determination should not be disturbed.

To the contrary, Respondent's employees who did not support the union were allowed to engage in conversations with other rank-and-file employees without interruption. For instance, Mr. Sims observed Mr. Martin and Ms. Mathis, both of whom had worn Vote No buttons at the facility, engaged in uninterrupted conversations with rank-and-file employees in the presence of supervisors. Mr. Sims observed that Mr. Martin and Ms. Mathis, who were promoted to supervisory positions after the election, did not engage in conversations with their co-workers prior to the union campaign. However, after the Union launched its campaign, Mr. Sims observed them engaged in conversation with everyone. (TR 109 lines 1-7). During this time period, Mr. Sims observed that Mr. Martin and Ms. Mathis regularly engaged in uninterrupted conversations with their co-workers in the presence

of their supervisor. Likewise, Ms. Mayes observed Mr. Lindsey, who did not support the union, engaged in lengthy conversations in the presence of his supervisors, and his conversations were uninterrupted. At these meetings, Mr. Lindsey was allowed to address both employees who supported the union as well as those who did not support the union. In addition, after Supervisor Campbell questioned Mr. Sims about his picture posted on the Union's website, Mr. Sims observed that Supervisor Campbell's attitude toward him changed for the time period September 2006 through October 2006. When Mr. Sims would leave his workstation, Supervisor Campbell would patrol the aisles or, from a distance, fold his arms and stare at Mr. Sims. By granting anti-union employees like Mr. Lindsey, Mr. Martin, and Ms. Mathis uninterrupted opportunities to address all employees, even those possibly unsure of whether or not to support the union, while scrutinizing the conversations and restricting the movements of employees who supported the Union, Respondent's supervisors wanted to demonstrate how unpleasant it could make life for those who supported the union. Also, Respondent wanted to limit and restrict the opportunities for active union supporters to muster support for the Union amongst their co-workers, in violation of §8(a)(1) of the Act. Id. In light of the foregoing, the record establishes that beginning on or about September 1, 2006, and continuing thereafter, Respondent more closely scrutinized and monitored the movements and conversations of its employees because they supported the union in violation of § 8(a)(1) of the Act.

### C. The Respondent Violated §8(a)(1) by Threatening Employees That They Would Lose Their Benefits Because They Supported the Union

While the Respondent contends that it was doing nothing more than engaging in its §8(c) rights and that its comments were "perfectly lawful", the Administrative Law Judge correctly determined that the Respondent violated §8(a)(1) of the Act by threatening employees that they

would probably lose their benefits because they supported the Union. The Board has determined that an employer violates §8(a)(1) of the Act by implying that those employees who voted in support of the Union would forfeit future pay increases. Overnite Transportation Co., 329 N.L.R.B. 990, *enforced* 240 F.3d 325 (4th Cir. 2001). Any threat that an employer makes to an employee that he may lose a benefit because the employee supports the Union, even if the proposed change is slight, violates §8(a)(1) of the Act. N.L.R.B. v. General Fabrications Corp., 222 F. 3d 218, 231 (6th Cir. 2000); United Artists Theater Circuit, Inc., 227 N.L.R.B. 115, 121 (1985); L'Eggs Products, 236 N.L.R.B. 354 (1978), enfd. in relevant part 619 F. 2d 1337 (9th Cir. 1980). The Board determined that an employer violated §8(a)(1) of the Act when one of its supervisors told rank-and-file employees that they would probably lose their benefits and that the company would probably close it doors if the employees voted in favor of the Union. Abramson, LLC and the United Brotherhood of Carpenters and Joiners of America, 345 N.L.R.B. No. 8 at p.4 (2005), citing Plastronics, Inc., 233 N.L.R.B. 155, 156 (1977). Also, the Board determined that an employer who told its rank-and-file employees that they would probably lose their benefits if they voted in favor of the Union violated §8(a)(1) of the Act. Custom Window Extrusions, 314 N.L.R.B. 850 (1994). Finally, the Board also determined that an employer violated §8(a)(1) of the Act when one of its supervisors told an employee that if the employees voted in favor of the Union that she would probably lose healthcare benefits such as sick pay and vacation. International Harvester Company, 222 N.L.R.B. 377 (1976).

In International Harvester, supra, a supervisor told an employee that if she supported the union that she would probably lose her benefits such as sick pay and vacation pay. Id. at 378-379. The issue the Board addressed was whether the supervisor's threat that she would probably lose both her sick pay and vacation pay violated §8(a)(1) of the Act. The Board determined that the

supervisor's comment violated the Act because it exceeded the "expressing of any views, argument, or opinion protected by Section 8(c)," and therefore, it was a threat of reprisal which violated §8(a)(1) of the Act. Id. at 382.

Applying International Harvester, on or about September 1, 2006, Supervisor Cooper told Ms. Mayes that she would probably lose her SC benefit if Mrs. Mayes and her co-workers voted in favor of the Union. During this same conversation, Supervisor Cooper further intimated to Ms. Mayes that she could also lose her pay as well by asking Ms. Mayes if she had ever missed a paycheck. Supervisor Cooper, who simply denied that the conversation with Ms. Hayes occurred during her testimony (TR 317), knew her threat to Ms. Mayes that she would probably lose the SC benefit would resonate with Ms. Mayes, who had relied on the SC benefit while under the supervision of Supervisor Cooper. The supervisor's threat to rescind the SC benefit was clearly tied to the Union activities of Ms. Mayes and her co-workers. Supervisor Cooper's threat to rescind Ms. Mayes' benefits was not qualified by proposals or counterproposals between the Union and Respondent. Her threat did not even contemplate that employee benefits, such as the SC benefit, could be increased or improved as result of negotiations between the Respondent and the Union. Furthermore, Supervisor Cooper's threat to Ms. Mayes to rescind the SC benefit did not express a view, an argument or opinion, which are protected by §8(c) of the Act. It was simply a threat of reprisal if Ms. Mayes and her co-workers continued to support the Union or continued to muster support amongst their co-workers. Therefore, the Administrative Law Judge's conclusion that Cooper's threat to Ms. Mayes that she would probably lose Respondent's SC benefit violated §8(a)(1) of the Act, is amply supported by the facts and the prevailing caselaw.

In Abramson, 345 N.L.R.B. No. 8, slip op. at 14 (2005), prior to an election, a supervisor

threatened employees during a captive audience meeting that they could probably lose (their) benefits if they elected the Union as their collective bargaining representative. Id. The supervisor attempted to rebut this threat that the employees would probably lose their benefits if they elected the union by stating that his comments were simply "a factual explanation of the consequences of the employees' selection of the Union." Id. at 16. The Board held that supervisor's threat that employees would probably lose their benefits had violated the Act, because he had linked the threat of probable rescission of employee benefits with the employees' union activities. Id. at 15.

Applying Abramson, Supervisor Cooper told Ms. Mayes that she would probably lose her SC benefit and her pay if the employees voted in favor of the Union. Supervisor Cooper, by linking her threat to the union activities of Ms. Mayes and her co-workers, violated §8(a)(1) of the Act. Similarly, In Evergreen, 348 N.L.R.B. No. 12 at 40 (2006), a supervisor told employees that if they joined or chose the Union that their employer "might" close. The employer argued that the supervisor's statements were "too vague and insubstantial to support a finding of an unlawful threat." The Board disagreed because it is well settled that a prediction of plant closure as a possibility rather than a certainty is violative of the Act. Daikichi Sushi Corp., 335 N.L.R.B. 622, 624 (2001); McDonald Land & Mining Co., 301 N.L.R.B. 463, 466 (1991). The Board determined that the supervisor's statement that the plant might close equated the employee's selection of the Union with closure of the plant, and was neither vague nor insubstantial. Furthermore, the supervisor did not cite any objective facts that showed if employees unionized, either economic conditions or competitive pressures would force their employer to close for reasons beyond the employer's control. AP Automotive Systems, 333 N.L.R.B. 581 (2001). In this case, Supervisor Cooper's threat to Ms. Mayes that she would probably lose her SC benefit violated the Act because

the supervisor did not cite any objective facts that would show that, due to unionization, economic pressures or competitive pressures would require that her employer rescind employee benefits or employee pay. Based on the foregoing, Judge Cullen properly determined that Supervisor Cooper's threat to rescind benefits from employees if they supported the Union violated §8(a)(1) of the Act.

### D. The ALJ Properly Concluded That the Respondent Violated §8(a)(1) of the Act by Threatening its Employees with the Inevitability of a Strike if its Employees Selected the Union as Their Collective Bargaining Representative

The ALJ properly concluded that the Respondent violated §8(a)(1) of the Act on or about the week of September 25, 2006, by threatening its employees with the inevitability of a strike if its employees voted in favor of the Union. It is well-settled Board law that an employer's message to its employees that it would be futile for them to select a union for their bargaining agent because that selection could only lead to strikes and loss of jobs constitutes unlawful interference and proper cause for the invalidation of an election. N.L.R.B. v. Gissel Packing Co., 395 U.S. 575 (1969); General Indus. Elec. Co., 146 N.L.R.B. 1260 (1975); In re Unifirst Corp., 335 N.L.R.B. 706 (2001); Eagle Comtronics, 263 N.L.R.B. 515 (1983); Gold Kist, 341 N.L.R.B. No. 135 (2001).

Ms. Sandra Hansen, who was still employed with Respondent testified at the hearing to the threats made by her supervisor. As noted above, it is well settled that where a non-alleged discriminatee current employee like Mrs. Hansen testifies against her employer, that her testimony is likely true. Flexisteel, 316 N.L.R.B. 745 (1995).

In Unifirst Corp., 335 N.L.R.B. 706 (2001), an agent of the employer told employees at a meeting that if they chose the Union that he would not abide by the Union's rules, that he would cause a strike, that it was futile to bring a union in, and that employees would lose their jobs. Id. An issue was raised whether the agent's threats conveyed the inevitability of a strike. Id. The Board

recognized that §8(c) of the Act permits an employer to make predications about the consequences of union representation as long as a supervisor's remarks are not accompanied by a threat of reprisal. Id. at 707. The Board determined that the agent's comments were not shielded by §8(c) because he did not limit his comments to discussing the consequences of an economic strike, for instance. To the contrary, the agent's threat conveyed the inevitability of a strike, and the threat of job loss, which the Board determined violated §8(a)(1) of the Act. Id. at 706.

Company Supervisor Campbell approached Mrs. Hansen with anti-union literature in his hand and made a number of threats, which were similar in magnitude to the threats made by the employer's agent in Unifirst. Id. at 706. First, he told Mrs. Hansen that he had spoken to fifty (50) of her co-workers and they had informed him that if the union went out on strike that they would cross the picket line. Second, he told Mrs. Hansen that if the Union was elected that she would have to go out on strike because a strike was the only power that a Union had. Third, he told Mrs. Hansen that she could be replaced if she went out on strike. Next, he told Mrs. Hansen that Respondent would not give the union a contract and that Mrs. Hansen and her co-workers would be forced to strike. (TR130, 139). Next, he told her that if she voted yes to be prepared to strike because the Union would not get a contract. He ended the September conversation with Mrs. Hansen by stating "...be prepared to strike." (TR 131). On or about October 17, 2006, Supervisor Campbell told Mrs. Hansen that he hoped that the Union lost the election. (TR 123 lines 1-12).

Supervisor Campbell's repeated threats to Mrs. Hansen were not protected by §8(c) of the Act, because he threatened Mrs. Hansen with the inevitability of a strike and because he stated that the Respondent would never sign a contract with the Union. He told her that if she voted yes that she should be prepared to strike. He then stated that fifty (50) of her co-workers had informed him

that they would cross the picket line. These threats robbed Supervisor Campbell's statements of any protection afforded by §8(c) of the Act. Id. at 707. Mrs. Hansen or any reasonable person would have objectively interpreted his comments to mean that a strike was inevitable because the Respondent would not sign a collective bargaining agreement if the employees selected the Union as their representative. Based on the foregoing, Respondent violated §8(a)(1) of the Act.

### E. The Respondent violated Section 8(a)(1) of the Act By Threatening its Employees with Replacement if They Supported the Union

The Judge properly determined that Supervisor Campbell's threat to permanently replace Mrs. Hansen if she went out on strike violated §8(a)(1) of the Act. The Board has held that an employer's statement that, in the event of a strike, its employees could be permanently replaced is an unlawful threat. Larson Tool & Stamping Co., 296 N.L.R.B. 895 (1989); Fern Terrace Lodge, 297 N.L.R.B. 8 (1989); Heartland Nursing Home, 307 N.L.R.B. 152, 158 (1992); Baddour, Inc., 303 N.L.R.B. 275 (1991); Mack's Supermarkets, Inc., 288 N.L.R.B. fn. 3 (1988); Gino Morena, 287 N.L.R.B. 1327 (1988).

In Baddour, supra, the supervisor threatened employees (without further explanation) that union strikers can lose their jobs to new, permanent replacements. The issue the Board decided was whether the supervisor's threat of permanent replacement violated Section 8(a)(1) of the Act. The Board, relying on Larson Tool & Stamping Co., 296 N.L.R.B. 895(1989), determined that the supervisor's threat violated Section 8(a)(1) of the Act because the threat that they could lose their jobs would be understood by a reasonable person that they would lose their jobs because of their support of the union. Furthermore, the Board determined the threat of permanent replacement made the supervisor's threat even more severe. When a threat of job loss is linked with a threat of

permanent replacement, a reasonable person would believe that they had no right to return to their job. Id.

Applying Baddour, Supervisor Campbell told Mrs. Hansen that Respondent would not sign a contact, and the only power that the Union had was a strike. He then told her that she would lose her job to a permanent replacement if she decided to strike. He then repeated that if she voted yes that she should be prepared to strike because the Respondent would not sign a contract with the Union. He did not explain to Mrs. Hansen that if she decided to strike that she would have recall rights. Supervisor Campbell's threat to Mrs. Hansen that she would be replaced violates Section 8(a)(1) of the Act, because Respondent cannot threaten its employees (without explanation) that they would lose their jobs as a consequence of a strike or permanent replacement. Supervisor Campbell's threat tied Mrs. Hansen's job loss and replacement with her support of the Union. What exacerbated Supervisor Campbell's threat of replacement was that he represented to Mrs. Hansen that he had polled no less than fifty (50) of her coworkers, and they told him that they would cross the Union's picket line.

### F. The Respondent violated Section 8(a)(1) of the Act by Informing its Employees That it Would be Futile for Them to Select the Union as Their Collective Bargaining Representative Because the Union Would Never Get a Contract From the Respondent

Supervisor Campbell's threat to Mrs. Hansen that she and her co-workers would never get a contract violated §8(a)(1) of the Act as a threat of futility if they planned to vote in favor of the Union. The Board has determined that it is impossible for employees to exercise their free choice to select a union as their exclusive bargaining representative if the overall effect of an employer's message creates an atmosphere of fear by portraying the selection of the union as futile or the economic hazards as inevitable. Storkline Corp., 142 N.L.R.B. 875 (1963); Oak Mfg., 141 N.L.R.B.

1323 (1963); Overnite Transp. Co., 296 N.L.R.B. 669, 671 (1989), enforced 938 F. 2d 815 (7th Cir. 1991). Therefore, an employer's statement that it would not sign a contract expressed futility for supporting the Union. Madison Industries, 290 N.L.R.B. 1226, 1230 (1988).

In Madison, 290 N.L.R.B. 1226, 1230 (1988), a supervisor told the employees that regardless of the outcome of the pending election, the employer would not sign a union contract. The Board, citing Without Reservation, 280 N.L.R.B. 1408, 1412, 1418 (1986), determined the supervisor's comments had violated §8(a)(1) of the Act because the supervisor's threat not only indicated to rank-and-file employees the short-term futility of them electing the Union, but also the long-term futility of retaining the Union as their exclusive collective bargaining representative. The Board reasoned that the supervisor's remarks revealed that the employer would not bargain in good faith if the employees selected the union as its collective bargaining representative, which had the impact of discouraging a reasonable person from voting in favor of the union. Madison at 1230.

Supervisor Campbell approached Mrs. Hansen and repeatedly told her that Respondent would not sign a contract if she and her co-workers voted in favor of the Union. First, Supervisor Campbell's threat represented to Mrs. Hansen the short-term futility of her voting in favor of the Union on October 18. Not only would it be futile for Mrs. Hansen to vote for the Union but it would also be futile for her fellow workers to vote for the Union on October 18. Second, Supervisor Campbell's threat expressed the long-term futility of her voting for the Union because her employer would not sign a contract with the Union, even if the employees selected the Union on October 18. Respondent's threat not to sign a contract would lead a reasonable person to objectively believe that it would be futile for the person to vote in favor of the Union because the Respondent would never agree to a contract or be bound by a collective bargaining agreement. Accordingly, supervisor

Campbell's statement that the Respondent would never sign a contract with the Union violated §8(a)(1) of the Act.

### G. Lead Persons

The Union challenged a number of employees classified as lead persons contending that these employees are supervisors under the act and therefore ineligible to vote in the election.[1] The Board has recently clarified its test to determine supervisory status in September of 2006 in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006), *Croft Metals, Inc.*, 348 NLRB No. 38 (2006) and *Golden Crest Healthcare Center, Inc.*, 348 NLRB No. 39 (2006).[2]

#### 1. The Oakwood Trilogy

In its long awaited decisions in the *Oakwood Trilogy*, the Board sought to "refine the analysis to be applied in assessing supervisory status . . . and endeavor[] to provide clear and broadly applicable guidance for the Board's regulated community." *Oakwood*, 348 NLRB No. 37, sl.op. at 1. The Board used the *Oakwood Trilogy* to "adopt definitions for the terms 'assign,' 'responsibly to direct,' and 'independent judgment' as those terms are used in Section 2(11) of the Act." *Id.* at 3. The Board held that "[i]n so doing, our goal is faithfully to apply the statute while providing meaningful and predictable standards for the adjudication of future cases and the benefit of the Board's Constituents." *Id.*

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[1] The Union withdrew its challenge to the process monitor employees at the hearing in this case.

[2] The *Oakwood*, *Croft Metals* and *Golden Crest* cases may from time to time hereinafter be referred to as the "*Oakwood Trilogy*" for the sake of brevity.

### a. The Board's Definition of the Terms "Assign," "Responsibly to Direct," and "Independent Judgment"

#### (1) "Assign"

The Board in *Oakwood* construed the term assign "to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." *Id.* at 4. The Board held that the term did not encompass "choosing the order in which the employee will perform discrete tasks." *Id.* It also does not encompass "ad hoc instruction that the employee perform a discrete task." *Id.*

#### (2) "Responsibly to Direct"

In *Oakwood*, the Board held: "If a person on the shop floor has 'men under him,' and if that person decides 'what job shall be undertaken next or who shall do it,' that person is a supervisor, provided that the direction is both 'responsible' . . . and carried out with independent judgment." *Id.* at 6.

The Board held that in order to be responsible direction, the alleged supervisor "must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly." *Id.* at 7. In other words, "it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he\she does not take these steps." *Id.* Furthermore, the party asserting supervisory status must not only show that the "purported supervisor is 'responsible' for the directed employees' performance"

but "that the exercise of that authority is not of a merely routine or clerical nature, but requires the use of 'independent judgment,' as those terms are defined herein." *Id.* at 6, n. 28.

### (3) "Independent Judgment"

The Board in *Oakwood* held that for judgment to be independent it must (1) be "free of the control of others" and (2) not be "dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." *Id.* at 8. Furthermore, "independent judgment" must be interpreted "in light of the contrasting statutory language, 'not of a merely routine or clerical nature.'" *Id.* "It may happen that an individual's assignment or responsible direction of another will be based on independent judgment within the dictionary definitions of those terms, but still not rise above the merely routine or clerical." *Id.*

## 2. Application of the Oakwood Trilogy In This Case Shows That The Lead Persons Are Supervisors

The lead persons in this case clearly have the ability to, and do in fact, make changes to work assignments and prioritize those work assignments in order to assure that production needs are met. (Tr. 275-277, 279; CPX 2). The second shift lead persons assist the second shift supervisor in the "direct supervision of second shift employees. (CPX 3; Tr. 277-278). The lead persons who testified agreed that the company's written job descriptions accurately reflected what they do including prioritizing and changing work assignments when necessary. (Tr. 360, 362).

Despite the company's attempt to obfuscate what the lead persons do, the leads have the authority to prioritize work and change work assignments to meet production needs. While they might on occasion get supervisor approval to change a work assignment, they can do so on their own when the need arises. These are hallmark indicators of supervisory status and evidence of

destroyed the laboratory conditions of the first election and that the Respondent should not benefit from its conduct in violation of the Act. The Respondent contends that the second election is not necessary despite its violations of the Act and objectionable conduct because the supervisors who committed the unlawful acts were "low level" supervisors and because the Board's decision in Bon Appetite Management Co., 334 NLRB 1042 (2001) dictates that no rerun be held. The Respondent's argument here strains the bounds of credulity past its breaking point.

This is not a case where the Union lost the election by a substantial margin. The election in this case was extremely close, 214-210, excluding the challenges. The change of three votes, could have affected the outcome of the election in the Union's favor. To say that these unfair labor practices and objectionable conduct were "isolated" is without any basis in fact. Ms. Mayes testified that supervisor Cooper and the other supervisors were extremely vigilant in their efforts to break up conversations of known Union adherents and equally accommodating in allowing those not supporting the Union to run rampant and permit those conversations. The testimony of Mayes and Sims showed that this conduct continued throughout the critical period and was hardly isolated. Mr. Sims similarly testified to the fact that supervisors were more closely monitoring and scrutinizing the Union adherents. Ms. Hansen testified that supervisor Campbell made numerous threats as detailed above and gave her the impression that he had spoken not only with her but at least 50 of her co-workers and made the same threats to others. Furthermore, supervisor Campbell was seen going from employee to employee with anti-union literature in his hand giving the same threatening speech to those employees that he gave to Ms. Hansen. It can hardly be concluded that these acts were "isolated" as the Respondent now claims.

It is undisputed that the Respondent's unlawful conduct occurred during the critical

period. Conduct which violates §8(a)(1) interferes with the exercise of a free and untrammeled choice in an election. A violation of §8(a)(1) during the critical period will necessitate setting aside the election unless it is "virtually impossible" to conclude that the employer's conduct affected the outcome. Bon Appetite, 334 NLRB at 1043; Consolidated Biscuit Co., 346 NLRB No. 101 (2006). The Respondent has not proffered any evidence to allow the Board to reach the conclusion that it was "virtually impossible" that the Respondent's conduct did not affect the outcome of the election. The violations here were significant especially in a close election with the outcome decided by only a few votes. In this case it is clearly possible, indeed probable, that the Respondent's violations affected the outcome of an election decided by four votes in a unit of more than 400.

## IV. CONCLUSION

Based on the foregoing, the Union respectfully submits that the Administrative Law Judge's findings and decision, including his proposed remedy, should be affirmed in all respects.

Respectfully submitted,

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Date: December 17, 2007

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answering Brief of the Union was electronically filed with the National Labor Relations Board and served by U.S. mail to:

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On this the 17th day of December, 2007.

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